

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION

THE BOARD OF EDUCATION OF SHELBY)
COUNTY, TENNESSEE,)

Plaintiff/Counter-Defendant,)

v.)

THE MEMPHIS CITY BOARD OF)
EDUCATION, et al.,)

Defendants.)

Case No. 2:11-cv-02101-SHM-cgc

THE BOARD OF COUNTY)
COMMISSIONERS OF SHELBY COUNTY,)
TENNESSEE, et al.,)

Third-Party Plaintiffs,)

v.)

ROBERT E. COOPER, JR., et al.,)

Third-Party Defendants.)

MEMPHIS EDUCATION ASSOCIATION’S MEMORANDUM IN SUPPORT OF
APPLICATION FOR A PRELIMINARY INJUNCTION

The Intervening Defendant Memphis Education Association (“MEA”) submits this memorandum in support of its application for a preliminary injunction pursuant to Fed. R. Civ. P. 65 and L.R. 65. The MEA is seeking injunctive relief to address actions taken by officials of the Plaintiff Shelby County Board of Education (“Board of

Education”) to “excess,” or lay off, current Memphis City Schools teachers in a way that is contrary to their rights under the Tenure Law, Tenn. Code Ann. §§ 49-5-501 et seq. and hence their constitutional rights under the Fourteenth Amendment; contrary to their rights under the collective bargaining agreement, or Memorandum of Understanding (“MOU”), with the Board of Education of the Memphis City Schools; and contrary to their general right or privilege of employment.¹ The MEA respectfully requests that this Court enjoin the Shelby County Board of Education from taking any actions to lay off or “excess” current Memphis City Schools teachers in any way that impairs, interrupts, or diminishes their rights and privileges protected under Tenn. Code Ann. § 49-5-203.

BACKGROUND

The MEA intervened in this case in order to ensure that the rights and privileges of current Memphis City Schools teachers are protected under Tenn. Code Ann. § 49-5-203 during the transition to a unified school system. In the Order allowing the MEA to intervene, this Court explained:

“Professional employees working at Memphis public schools have a legally-recognized interest in the continuation of their rights and privileges if the Shelby County Board of Education becomes or has become the governmental entity responsible for administering public schools located in the City of Memphis. [Tenn. Code Ann.] §§ 49-5-203 (a), (b).”

[ECF Doc. No. 150, pp. 4-5].

In its August 8, 2011 Order, the Court stated that while the Commissioner’s determination under Tenn. Code Ann. § 49-5-203(d) is not a condition that must be satisfied before the transition to a unified school system may begin, the statute does require the Commissioner to “determine that teachers’ rights and privileges will not be

¹ The MOU is in the record at ECF Doc. No. 148-3.

impaired, interrupted, or diminished before a change in governmental structure or organization becomes effective.” [ECF Doc. No. 243, p. 116]. Meanwhile, although the two systems continue to operate under separate administrations, the ultimate responsibility for decisions affecting the education of Memphis schoolchildren already lies with the Shelby County Board of Education. [ECF Doc. No. 243, p. 141].

The Court explained how compliance with the requirements of Tenn. Code Ann. § 49-5-203 was to be accomplished in this transition:

“The purpose of Tennessee Code Annotated § 49-5-203 is to protect the rights of teachers. Pursuant to Tennessee Code Annotated § 49-5-203(d), the parties must promptly provide all information to the Tennessee Commissioner of Education necessary for him to determine that teachers’ rights and privileges will not be impaired, interrupted, or diminished by the transfer of administration. See Tenn. Code Ann. § 49-5-203(d). ... As the public body responsible for overseeing the transition process, the Shelby County Board of Education must ensure that the Commissioner of Education has the information necessary to make his determination. The Board is required to submit a plan, in a form satisfactory to the Commissioner, to ensure that teachers’ rights are protected. Until the Commissioner makes his determination, the transfer of administration of Memphis City Schools to the Shelby County Board of Education cannot be completed.”

[ECF Doc. No. 243, pp. 142-143].

The Court then declared that the Shelby County Board of Education is required to oversee the transition process and must make present decisions necessary to provide for the future education of Memphis schoolchildren, including the hiring of teachers and staff. [ECF Doc. No. 243, p. 143]. The Court declared that both the Shelby County and Memphis City Boards of Education were required to promptly give the Commissioner all necessary information to determine that the rights and privileges of teachers working in

the Memphis City Schools will not be impaired, interrupted, or diminished. [ECF Doc. No. 243, p. 144].

In the September 28, 2011, Consent Decree, the parties adopted and agreed to abide by the Court's August 8, 2011, Order. [ECF Doc. No. 262, p. 11]. Under the Consent Decree, the Shelby County Board of Education became responsible effective October 1, 2011, for governing both the Memphis City and Shelby County school districts. [ECF Doc. No. 262, p. 11]. The parties thus agreed that all information necessary for the Commissioner to determine that the rights and privileges of Memphis City teachers are protected in the transition was to be "promptly" given to the Commissioner as required by the August 8, 2011, Order; and that the party ultimately responsible for satisfying that statutory duty enforced by the Court's Order was the Shelby County Board of Education.

On March 5, 2013, this Court appointed a Special Master. One of the duties given to the Special Master was to "work with the parties and the Tennessee Department of Education as necessary to provide that the rights and privileges of teachers are not impaired, interrupted, or diminished. [ECF Doc. No. 502, p. 3]. As shown by the accompanying email communication from the Office of the Attorney General, the Board of Education has not submitted a transition plan to the Commissioner in order for the Commissioner to ascertain whether the rights and privileges of teachers are protected. **[Exhibit 1]**.

The Board of Education is currently making staffing decisions that impair, interrupt, and diminish the statutory, constitutional, and contractual rights of Memphis City teachers. The affidavits filed in support of the MEA's application for an injunction

reveal a pattern of lay offs, or “excessing,” of Memphis City teachers contrary to their rights under law as tenured teachers and contrary to their rights under the MOU. In particular, tenured teachers are being laid off or “excessed” based on staffing decisions by Principals at particular schools, and then forced to apply for vacant positions in the school system, without regard to their right under the Tenure Law to continued employment in the school *system*. In addition, teachers are being laid off or “excessed” without regard to the provisions of Article 14 of the MOU, which affords rights based on seniority.

ARGUMENT

The Court has stated that the Commissioner’s approval of a transition plan was not a condition precedent to the commencement of the transition process. However, that acknowledgement is not a license for the Board to take actions because of the upcoming transition which presently impair, interrupt, or diminish Memphis City Schools teachers’ rights simply because the actions are implemented before the actual transition date. Yet, that is precisely what is occurring now. Current teachers in the Memphis City Schools are being informed that they are being laid off, or “excessed,” based on expected staffing needs of the unified school system. Yet, these lay offs do not comply with and are being undertaken in disregard of those teachers rights as tenured teachers and in disregard of their rights under the MOU, which remains in effect until June 30, 2013. [See generally Affidavits for Stewart², Plunk, Langford, Fleming, Dennis, Bledsoe, and Foster].

² Since signing her affidavit, Ms. Stewart has secured employment for the 2013-14 school year.

A. Tenure.

The Board of Education has authorized school principals to make school-by-school lay off, or “excessing,” decisions. Meanwhile, the Board of Education is conducting job fairs and filling openings at other schools. [Dennis Affidavit]. Tenured teachers are being laid off at their assigned schools, and then told that they may apply for positions that are open at other schools. [Stewart Affidavit; Plunk Affidavit]. This process by the Board of Education is underway based on anticipated 2013-14 staffing needs at various schools and is therefore occurring because of the upcoming transition. The lay offs of these teachers cannot be separated from the transition to a unified school system. Yet, in these lay offs the continued employment enjoyed by these teachers as a right of tenure is being diminished or disregarded.³

Tenure is a status that carries with it an expectation of continued employment, an expectation that rises to the level of a property interest to which due process attaches, requiring notice of charges and an opportunity for a hearing before the teacher may be dismissed. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972); *Gunasekera v. Irwin*, 551 F.3d 461, 469 (6th Cir. 2009); *Farhat v. Jopke*, 370 F.3d 580, 595 (6th Cir. 2004). The status of tenure applies generally to “a position as a teacher under the jurisdiction of the Board,” not to a particular assignment or school. *State ex rel. McGhee v. St. John*, 837 S.W.2d 596, 605 (Tenn. 1992)(O’Brien, J., concurring and dissenting); *see also, McKenna v. Sumner County Board of Education*, 574 S.W.2d 527, 529 (Tenn. 1978); *Mitchell v.*

³ That Tenn. Code Ann. § 49-5-203 extends to more than just rights in the MOU is inarguable. Tenn. Code Ann. § 49-5-203 became law in 1971, seven years before the passage of the Education Professional Negotiations Act (EPNA) authorizing collective bargaining between school boards and professional employees’ organizations like the MEA.

Garrett, 510 S.W.2d 894, 898 (Tenn. 1974); *State ex rel. Pemberton v. Wilson*, 481 S.W.2d 760, 768 (Tenn. 1972); *State v. Yoakum*, 297 S.W.2d 635, 640 (Tenn. 1956). The Sixth Circuit long ago acknowledged that the allowance of transfers of tenured teachers from one position or assignment to another reflects the Tennessee Legislature's judgment that tenure is a system-based status, not an entitlement to a specific job. *Coe v. Bogart*, 519 F.2d 10, 12-13 (6th Cir. 1975).

The necessary corollary of those holdings is that the elimination of a particular position, alone, does not eliminate the expectation of continued employment that comes with tenure. It is only where it has become necessary to reduce the number of teaching positions "in the system" that a lay off of a tenured teacher is permitted. Tenn. Code Ann. § 49-5-511(b). Meanwhile, the Legislature has expressly cautioned that abolition of a position cannot be used as a device to avoid the normal statutory and due process rights to which a tenured teacher is entitled. *Id.*

The accompanying affidavits reflect that as the Board of Education has been "excessing" or laying off tenured teachers, it has been filling vacancies in other schools in the system that the laid off teachers were qualified to fill. [Dennis Affidavit, Stewart Affidavit, and Plunk Affidavit]. By making tenured teachers reapply for such vacancies simply because their particular assignments at particular schools are eliminated, the Board of Education is impairing the statutory and constitutional rights of the laid off tenured teachers.

B. Contract.

It is not the MEA's contention that the Board of Education must await the expiration of the MOU to make its personnel decisions. When to make those decisions is

a management determination. The MEA's contention is simply that if the Shelby County Board of Education is going to make decisions on staffing for the unified school system while the MOU remains in effect, the Board must make those decisions in a way that does not impair, interrupt, or diminish the rights of Memphis City Schools teachers under that MOU.

In *Knox County v. City of Knoxville*, 1987 Tenn. App. LEXIS 3225 (Tenn. Ct. App. 1987) (copy attached), the Tennessee Court of Appeals considered whether lay offs of tenured Knoxville City teachers in a transition to a unitary Knox County school system had to comport with seniority and other protections contained in the city charter's tenure provision. The Court concluded that those seniority and other rights relative to personnel decisions in the City tenure provisions were among the rights and privileges protected from diminution under Tenn. Code Ann. § 49-5-203. *Id.*, at *26-28.⁴

Article 14 of the MOU includes detailed requirements mandating that when a staff reduction is to occur at a school location, the principal must first seek volunteers. Thereafter, system-wide seniority is the controlling factor provided certification requirements are met, unless experience, curriculum needs, or accreditation requirements require a different result. In layoffs, where the requirements of certification and coaching assignments are fulfilled, system-wide seniority is the determining factor; and a teacher affected by staff reduction may exercise system-wide seniority to bump the teacher with the least amount of system-wide seniority in the system in an assignment for which the

⁴ Although the seniority and other protections at issue in Knox County were contained in a Private Act, the same analysis applies to seniority provisions in the MOU. Tenn. Code Ann. § 49-5-203 broadly protects teachers' rights and privileges. The statute does not distinguish among the protected rights and privileges based on whether their sources may be in Private Acts or in contracts. As then acting Commissioner of Education Patrick Smith attested in this case, even customs and practices may be sources of rights and privileges protected from impairment by Tenn. Code Ann. § 49-5-203. [ECF Doc. No. 222-1, pp. 115-116].

more senior teacher meets the criteria. [ECF Doc. No. 148-3, Article 14, Sections C and D].

Commissioner Smith's acknowledgment of the breadth of the rights and privileges protected by Tenn. Code Ann. § 49-5-203 [E.C.F. Doc. No. 222-1, pp. 115-116] is consistent with the broad, remedial construction given the statute by the Tennessee Court of Appeals. *Knox County, supra*, at *16.⁵ Tennessee's remedial statutes are to be liberally construed to achieve their salutary purposes. *See, e.g., Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 841 (Tenn. 2008).

C. Employment.

By laying off teachers while it has open positions that it is filling, the Board of Education plainly is choosing to end the employment of more Memphis City Schools teachers than necessary for its expected 2013-14 personnel needs. In that respect, the Board of Education is impairing the more general right or privilege of employment enjoyed by all affected Memphis City Schools teachers – both tenured and non-tenured – who could be transferred to an open position. *Knox County* involved circumstances analogous to those here and represents the most authoritative general analysis of the requirements of Tenn. Code Ann. 49-5-203 by the Tennessee courts. In *Knox County* the Court of Appeals rejected the County school system's assertion that it could choose whether to hire or not hire City teachers:

⁵ Judge Riley Anderson wrote the decision for the Court of Appeals decision in *Knox County*. The Court of Appeals applied Tenn. Code Ann. § 49-5-203 broadly to protect the rights and privileges of former Knoxville City teachers under circumstances similar to those here. The only right that the Court of Appeals did not treat as protected was the right of former City teachers to direct receipt of the "state annuity" upon retirement. The Supreme Court granted the association's application for permission to appeal, which dealt solely with the "state annuity" issue. 1988 Tenn. LEXIS 203, 204 (Tenn. 1988). Meanwhile, the Supreme Court denied Knox County's application to appeal the other portions of the Court of Appeals decision. 1988 Tenn. LEXIS 205 (Tenn. 1988). The Supreme Court also refused to allow Knox County to raise those issues under Tenn. R. App. P. 13(a).

“It is clear, under the terms of the statute, that the County had no broad, general discretion in hiring or not hiring the former City employees, and had no discretion regarding their tenure status under Article XII as contemplated by § 49-5-203. The statute requires the County to afford full Article XII protection. The County may reduce personnel for legitimate financial or enrollment reasons, but it must do so, as to former City employees, solely under the substantive provisions of Article XII, providing all seniority and other protections required.”

Knox County, supra, at *28 (emphasis supplied).⁶

Reading the plain terms of the decision, the *Knox County* Court’s conclusion that the County had no broad general discretion in hiring or not hiring former City teachers was not limited just to tenured teachers. The Court regarded the right to employment and tenure status as separate matters. It only makes sense that employment, whether a “right” by virtue of tenure status or a “privilege” for a non-tenured teacher, would be protected under Tenn. Code Ann. § 49-5-203. If a teacher’s right or privilege of employment were not protected, then the protection of other rights and privileges related to employment would be illusory.

D. Injunction Standards.

The purpose of an injunction is to “preserve the relative positions of the Parties until a trial on the merits can be held.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). There are four factors to consider in granting a preliminary injunction:

(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.

⁶ The referenced “Article XII” was reference to the Private Act, incorporated in the City charter, which provided a tenure system for City teachers. Under the City tenure provisions, if a reduction in force was required, seniority would govern. *Id.*, at *26-27.

Bays v. City of Fairborn, 668 F.3d 814, 818–19 (6th Cir. 2012). These factors “are not prerequisites to be met, but rather must be balanced as part of a decision to grant or deny injunctive relief.” *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995). “A district court is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are dispositive of the issue.” *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003).

The MEA is entitled to this injunction because of its likelihood of success on the merits. The actions being taken by the Board of Education run afoul of the broad protections of Tenn. Code Ann. § 49-5-203. If injunctive relief is not granted, the tenured teachers whose rights and privileges are disregarded will suffer the immediate and irreparable harm of job loss, a loss of their property interest in continued employment. They will have lost the statutory protections of the tenure law; the statutory protections of Tenn. Code Ann. § 49-5-203; and their contract rights under the MOU. In the event that they may later prevail on the merits, any attempt to reinstate them to employment in the Shelby County unified school system will cause chaos in the new system and will upset learning for the students of that system as existing teachers are supplanted.

1. The MEA is substantially likely to succeed on the merits.

In establishing a likelihood of success on the merits, a movant “is not required to prove his case in full at a preliminary injunction hearing.” *Certified Restoration Dry Cleaning Network, LLC v. Teneke Corp.*, 511 F.3d 535 at 542 (6th Cir. 2007)(internal citations omitted). “It is ordinarily sufficient if the plaintiff has raised questions going to

the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Id.* (internal citations omitted).

Tenn. Code Ann. § 49-5-203(a), insures:

“The change in the governmental structure of a school system ... shall not impair, interrupt or diminish the rights and privileges of a then existing teacher; and such rights and privileges shall continue without impairment, interruption or diminution.”

The statute is unequivocal, a remedial statute whose protections should be liberally construed and indeed have been liberally construed and applied by Tennessee courts. This Court has reiterated and relied on the protections this statute provides in portions of its prior Orders.

If the Board of Education had submitted to the Commissioner a plan for transition that called for the employment rights and privileges, tenure rights, and contract rights of Memphis City Schools teachers to be disregarded, undoubtedly the Commissioner would not have approved that plan because of its failure to comport with Tenn. Code Ann. § 49-5-203. The absence of such a plan does not excuse the disregard of the rights and privileges that the plan is supposed to protect.

2. The adversely affected teachers will suffer irreparable harm.

“A plaintiff’s harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages.” *Certified Restoration Dry Cleaning Network*, 511 F.3d at 550 (quoting *Overstreet v. Lexington-Fayette Urban County Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002)). The right to employment protected by Tenn. Code Ann. § 49-5-203 is a teacher’s right to preserve her livelihood. For cost and other reasons, more senior and experienced teachers are likely to encounter greater difficulties

finding alternate employment in the teaching profession. This reality is one of the reasons the MEA negotiated seniority to be a determining factor in Article 14 of the MOU. [Foster Affidavit]. Seniority-based job security provides an incentive for teachers to continue teaching within the same school system, so that the system enjoys the benefit of seasoned and experienced teachers. [*Id.*]. Both the affected teachers and the school system itself are likely to suffer irreparable harm from the Board of Education's disregard of teachers' rights and privileges if not enjoined.

3. There is no risk of harm to others.

The MEA is not seeking monetary relief or relief that will cause the Board of Education to halt the transition process. The MEA is simply asking the Court to require the Board of Education to follow a law that the Board of Education long ago accepted as binding when it accepted the Consent Decree. Requiring that the Board of Education accomplish this transition within the strictures of the Tenure Law and the current MOU will cause it no harm, but rather will achieve the Legislatures remedial objective apparent on the face of Tenn. Code Ann. § 49-5-203.

4. The public interest will be served by an injunction.

The public interest weighs in favor of granting the requested relief. The public interest is served by the enforcement of laws of general application like The Tenure Law and Tenn. Code Ann. § 49-5-203, a law designed to provide some measure of stability in employment for public school teachers who are serving the public's interest in their work and who find themselves confronted with the sort of administrative change that is occurring here. The public interest is served by the enforcement of contracts, as reflected in state and federal constitutional provisions that prohibit laws impairing the obligations

of contract. The public interest is served by actions on the part of government officials that are in accordance with the Court's Orders, particularly those set out in Consent Decrees. And the public interest is served by an injunction that addresses these issues now, before the transition actually occurs, and prevents the sort of instability and chaos in the newly unified Shelby County school system that will result if such patent disregards of the affected teachers' rights and privileges are not remedied until much later.

CONCLUSION

For all of these reasons, the MEA respectfully requests that the Court enjoin the Board of Education from (1) laying off tenured teachers due to abolition of their particular positions at particular schools if there are available positions for which they are qualified at other schools in the unified system; (2) laying off or "excessing" current Memphis City Schools teachers in any fashion contrary to the process outlined in Article 14 of the MOU; and (3) exercising broad, general discretion in not hiring current Memphis City Schools teachers for 2013-14 while opening up teaching vacancies to new hires.

Respectfully Submitted,

/s Richard L. Colbert

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon all Filing Users through the Electronic filing system on this 28th day of May, 2013. A courtesy copy has also been provided to Special Master Rick Masson, 119 South Main, Suite 600, Memphis, Tennessee, 38103.

/s Richard L. Colbert
Richard L. Colbert